In the High Court of Uttaranchal at Nainital.

Criminal Appeal No. 48 of 2004

Nafees S/o Hanif
R/o Ward No. 12, Dausarai,
P.S. Kutubsher Saharanpur (U.P.) …..Appellant.

Vs.

State of Uttaranchal …..Respodnent.

Sri K.S. Verma, learned counsel for the appellant.
Sri Nandan Arya, learned A.G.A. for the State.

Date: 15.07.2004

ORAL JUDGMENT **(Per: Hon'ble Irshad Hussain, J.)**

The appellant was tried in the court of Special Judge, N.D.P.S. Act, Dehradun on an allegation that while he was standing in front of Arora Sweet Shop on Saharanpur road within the circle of P.S. Vikas Nagar, District Dehradun at about 10.50 p.m. on 26-10-2002, he was carrying with him 1 Kg. 900 grams *'Charas'* and thereby he had committed an offence punishable under section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act').

2- According to the prosecution the appellant was arrested by the police party consisting of S.H.O., P.S. Vikas Nagar Sri Lakshman Singh Bisht (P.W.3), S.I. Naveen Chand Semwal (P.W.1) and constable driver Satvir Malik on the lead given by the police informer. The police party was then on petrol duty. The appellant on being apprehended told that he was possessed of the contraband. Tehsildar-Magistrate Sri Prabad Singh Butola (P.W.2) was summoned at the scene of the arrest and search was made in his presence leading to recovery of the contraband viz. *'Charas'* weighing 1 kg. 900 grams from the appellant. Two samples of 25 grams each were taken and these were properly sealed as was the case with the remaining seized *'Charas'*. Memo of recovery and arrest (Ex.Ka.1) was prepared at the spot and on its basis F.I.R. (Ext. Ka.8)

was lodged at the police station the same day at 10.50 p.m. and a case was accordingly registered against the appellant. Investigation was entrusted to S.I. Khurseed Ahmed (P.W.4) who on completion of the investigation submitted charge sheet (Ext. Ka.7) against the appellant. Chemical Examiner Report (Ex.Ka.12) confirmed that the contraband seized from the appellant was *'Charas'*

3- In order to prove its case the prosecution had examined the witnesses named above, besides the constable Keshva Nand (P.W.5) who proved copy of the G.D. report no.25 of 26-10-2002 relating to the deposit of the sealed bundles of the contraband and two sample containers. This witness gave evidence that the case property was kept intact and duly sealed and also that thh sample packets of the contraband were sent duly sealed for chemical examination and were received back as such through constable Samar Singh.

4- P.W.1, P.W.2 and P.W.3 gave evidence to the effect that after the arrest, search of the appellant was made as per the legal requirement and that the contraband – *'Charas'* weighing 1 kg. 900 grams was recovered from the appellant's possession. Witnesses also proved search memo (Ex.Ka.2); arrest memo (Ext. Ka.3); information memo (Ext.Ka4) sent to the address given by the appellant on arrest and recovery; memo of effecting search among the members of the police party (Ext.Ka.5) to show that none of them was possessed of anything incriminating; receipt of payment of charges at the P.C.O. (Material Ext. 1) from where the telephonic message was given to the Tehsildar Magistrate to reach the scene of the incident to effect the search in his presence; sample seals (Material Exts. 2,3 and 4) and site-plan (Ext.Ka.6) prepared by the Investigating Officer.

5- Appellant pleaded not guilty and contended that he has been falsely implicated in the case by the police. No evidence was adduced in defence.

6- The trial court believed the evidence of the witnesses of the prosecution in regard to the arrest and recovery of the contraband as stated above. Therefore, the appellant was convicted and sentenced

to undergo Rigorous Imprisonment for 10 (ten) years and to pay fine of Rs. 1,00,000/-(one lac) and in default of payment of fine to further undergo S.I. for 2(two) years under section 8/20 of the 'Act', per judgment and order dated 29-1-2004.

7- I have heard the learned counsel for the appellant and the learned A.G.A. and have carefully considered the evidence on record, circumstances and the probabilities of the case.

8- Learned counsel for the appellant in the first instance submitted that the compliance of the mandatory provision of section 50 of the 'Act' has not been made in view of the fact that the memo of recovery and arrest (Ext.Ka.1) no-where states that the appellant was informed of his right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the mandatory provision was thus not duly complied with in this case. The learned counsel also drew attention to the principle of law as laid down by the Constitution Bench of the Apex Court in the case of **State of Punjab Vs. Baldeo Singh; (1999) 6 S.C.C. 172** in support of the submission that the learned trial court made an error in not taking into account the above legal infirmity of the case. Having considered the import of the reported decision in the light of the material on record I find no merit in the argument of the learned counsel. The reason is that it has been mentioned in the memo of recovery and arrest that the appellant himself on being apprehended told that he was possessed of *'Charas'* and therefore was not willing to be searched before a Magistrate and offered himself for search by the members of the arresting party. It has further been mentioned that since search need to be made either before a Magistrate or a Gazetted Officer the Tehsildar-Magistrate was on telephone given information through constable Surendra Singh to reach the scene of the incident so that the search may be effected in his presence. Not only this P.W.1 and P.W.3, the two members of the police party testified that the appellant on being arrested was told of his right that if he require, his search will be conducted in the presence of a Gazetted Officer or a Magistrate and further that the Tehsildar

Magistrate (P.W.2) was summoned and the search was made in his presence. Therefore, from the evidence it is proved that not only the appellant was duly informed of his right but he was searched in the presence of a Magistrate and *'Charas'* weighing 1Kg. 900 grams, as has also been stated to by these witnesses, was recovered from the possession of the appellant.

9- In short there being full compliance of the mandatory provision of section 50 of 'Act' the learned trial court has also rightly rejected the similar submission advanced on behalf of the defence.

10- It was next contended that no public witness was kept present at the time of the arrest of the appellant and recovery of the contraband. Similar argument was advanced before the learned trial court with a view to assail the reliability of the police witnesses who were interested in the success of the prosecution. The argument was repelled by the learned trial court on the ground that arrest and recovery was made at about 10-50 p.m. and since in that hour of the night no shop remain open the people are not normally available there in the market and it was thus difficult for the police party to ensure presence of public witness of the arrest and recovery. There is nothing in the evidence of the prosecution witnesses as may in any way indicate that despite the availability of the public witnesses none was kept present at the time of the arrest and seizure. Moreover there is nothing incriminating in the cross-examination of the prosecution witnesses which may in any way suggest that the appellant was falsely roped-in and no recovery of the contraband was effected from his possession. In the face of these facts and peculiar feature of the case the submission of the learned counsel for the appellant that in the absence of the independent public witness the evidence of the witnesses examined in the case should be disbelieved, can not be safely accepted. The learned trail court also made no error in discarding the similar argument and in placing reliance on the evidence of the witnesses examined in the case.

11- It was further contended that the sentence awarded in the case was severe. The appellant was possessed of 1 kg. 900 grams of *'Charas'* and since it was commercial quantity per notification issued by the Central Government in exercise of the powers conferred by clauses (viia) and (xxiiia) of section-2 of the 'Act', per entry at serial No. 23 of the table of the notification the case of the appellant fall under section 20(b) (ii) (C) of the 'Act' and which prescribe Rigorous Imprisonment for a term which shall not be less than 10 years and also fine which shall not be less then 1,00,000/- rupees. The trial court has therefore passed minimum sentence in this case against the appellant and therefore it was not a case of severe punishment awarded by the learned trial court.

12- For the reasons aforesaid there is no merit in this appeal and the same if liable to be dismissed.

13- The appeal is hereby dismissed and the judgment and order dated 29-1-2004 convicting and sentencing the appellant to undergo R.I. for 10 (ten) years and to a fine of Rs. 1,00,000/- (one lac) and in default of payment of fine to further undergo S.I. for 2(two) years under section 8/20 of the N.D.P.S. Act, 1985 in hereby affirmed.

14- The appellant is already in jail and he shall suffer the sentence as awarded.

15- Let the record be sent back to the court concerned for necessary compliance, if any.

(Irshad Hussain, J.)

ISB